IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 122 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.S.DAVE

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GHANSHYAMBHAI L. PATEL - Petitioner(s)
Versus
RAMA NEWSPRINT & PAPERS LTD. - Respondent(s)

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Appearance :
MR RR MARSHALL for Petitioner(s) : 1,
MR MIHIR JOSHI SENIOR ADVOCATE WITH MS AMRITA M THAKORE for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.S.DAVE

Date : 22/06/2006

ORAL JUDGMENT

1. This petition is filed by partnership firm carrying on business in name and style of M/s. Sagar Construction, as reflected from the cause title of the petition.

2. Above partnership firm, the petitioner herein has preferred this petition under Section – 433 of the Companies Act, 1956, with a prayer that the Company i.e. Rama Newsprint and Papers Limited at

village Borbodhan, Ta. Olpad, District : Surat be ordered and directed to be wound up by this Court under the provision of Companies Act, 1956 and Official Liquidator attached to this Court be appointed as Liquidator and to take necessary action in accordance with law.

3. As per say of the petitioner, for carrying out certain construction related activities and other allied works of contract, work orders were issued to the petitioner firm. Accordingly, the work commenced in or around October, 1993 and continued till end of 1996 and on different dates, work orders were given to the petitioner firm. It is the say of the petitioner firm that to execute work orders, the petitioner firm hired labour, machineries, electrical and mechanical equipments and also entered into negotiation for laying of raw water pipe line for carrying out the work as ordered. For this purpose, the Company had issued a certificate dated 1st November,1995, wherein it is mentioned that work worth Rs.2,55,82,000/- has been carried out satisfactorily by the petitioner firm. It is further

case of the petitioner firm that after completion of work, the Company had started delaying and not made any payment and therefore, the petitioner firm addressed various letters dated 16th January, 1994, 5th June,1994 and last letter dated 8th May, 1997, to which the Company had not given any reply. Even the efforts made by the petitioner firm to negotiate and contact various functionaries of the Company, did not yield any result and therefore, finally addressed a statutory notice on 31-05-2001 asking to make outstanding dues as referred in above notice. The total sum of outstanding dues according to the petitioner firm was Rs.1,30,23,153-00 to be paid with interest @ 24% p.a. To the above notice dated 31st May, 2001, the Company had given a criptic reply on 19th June, 2001 by which the claim of the petitioner firm was not admitted and contents therein were totally denied, keeping the liberty to give detailed reply later on.

3.1. It appears from the record that this Company Petition came to be filed on 26th June, 2001 and later on notice came to be issued and reply is filed by

M/s. Rama Newsprint and Paper limited, denying the claim made in the Company Petition. It is averred in the affidavit-in-reply that no amount, whatsoever, is outstanding and payable to the petitioner by the respondent and entire amount of bills raised by the petitioner firm and certified by the Development Consultant Limited has been paid. It is also averred that the claim of the petitioner is bogus and concocted and be called upon to furnish the detailed statement of account in support of its claim. He has also averred in paragraph 10 of the above reply that the bills No.17, 47, 71, 72, 75, 86, 91, 95, 102, 108, 110, 141, 148 stated to be issued prior to December, 1995 and were not shown as outstanding in letter dated 2nd February, 1996, which establishes that the petitioner had received the payment. Some other history consisting contradictory facts were also shown in sub-paragraph – b,c,d & e of paragraph 10 of the affidavit-in-reply.

3.2. In rejoinder to this reply, the petitioner firm adhered to the claim made in the petition and submitted that the payment remains to be outstanding

and therefore, respondent - company to be wound up.

3.3. Affidavit in Sur-rejoinder filed by the respondent – Company categorically mentioned about the payment of bills through Demand Draft or cheques and vouchers of different dates for the amount paid from 31st August, 1993 to 31st March, 1996. It is also stated without there being any basis, the petitioner firm has continued to submit bills, even though, the payment in that regard is also made.

4. Shri R.R. Marshall, learned advocate appearing for the petitioner firm has contended that the certificate at Annexure A dated 1st November,1995 annexed with the petition clearly indicates that works have been carried in a very satisfactory manner. As per said certificate, costs of work executed by the petitioner firm is of Rs.255.82 Lacs. He has also submitted that the correspondence between the parties from 6th June, 1994 to 8th May, 1997 indicate about non-payment of dues by respondent Company. Shri Marshall has also contended that the reply to the statutory notice by respondent Company

is also criptic and on various occasions, representations were made to the top functionaries of the respondent Company, has not paid any amount and therefore, in-ability on the part of the respondent Company to estimate its statutory liability under the Companies Act under various provisions of Companies Act 1956 rendered the Company is liable for winding proceeding. Not only that by not making payment to the outstanding dues of the petitioner firm, according to Shri Marshall for the petitioner firm, the Company has lost its financial substratum and requires to be wound up exercising powers under Sections 443 and 444 of the Companies Act, 1956.

5. Shri Mihir Joshi, learned Senior Counsel appearing for the respondent Company has drawn my attention to the reply filed by respondent Company on 19th June, 2001 to the statutory notice given by the petitioner firm and submitted that right from beginning the claim of the petitioner firm is not admitted and refuted by the respondent Company. Not only that, according to him within a week thereafter, this Company Petition is filed and therefore, there

was no question of submitting detailed reply to the statutory notice and so far as the proceeding of this petition is concerned, affidavit-in-reply and affidavit in Sur-rejoinder filed by the respondent Company clearly indicate that the claim of the petitioner firm is incorrect and bogus. He has submitted that in spite of repeated requests, the petitioner firm is unable to give the detailed statement of Account, indicating non-payment of certified bills. He has submitted that number of discrepancies as averred in paragraph 10, sub-paragraph a,b,c and d of affidavit-in-reply indicate about lodging of false claim by the petitioner firm. He has also submitted that in paragraph 8 of Sur-rejoinder, it is clearly mentioned that the petitioner has taken the gross amount of running account bills without deducting payments made in respect of the immediately preceding running Account bills. Thus, according to him, even the certificate annexed by the petitioner dated 1st November,1995 is only about estimated value of the work, as reflected as approximate costs. He has submitted that Annexure 5 to the Sur-rejoinder reveals total payment of value

of the work executed by the petitioner firm and no amount remains outstanding.

5.1. According to Shri Mihir Joshi, learned senior counsel appearing for the respondent Company, the claim of the petitioner firm is time barred and therefore also, need not require any adjudication, which lacks bonafide. He has also relied on the decision reported in case of ***Ferro Alloyes Corporation Ltd. V. Rajhans Steel Ltd. 2000 Company Cases Vol.99, 426*** of decision of Patna High Court in support of his arguments and also another decision of this Court reported in case of ***Gramercy Emerging Market Fund V. Essar Steel Ltd. 2002(0) GLHEL 203852.*** So far as financial strength of the Company is concerned, he has submitted that the respondent Company is leading manufacturer of newsprint and papers in the country and for the year ended 31st March, 2005, the respondent Company had registered a total production of 1,18,092 M.T. and had turn over of Rs.28806.28 lacs net of excise duty. The Company has also exported goods worth Rs.1394.80 lacs and the financial balance-sheet indicate net profit of

Rs.2073.37 lacs during the above period. Therefore, according to him, no case is made out on the ground that the Company has failed to discharge its liability under the Companies Act, 1956. The petition is required to be rejected.

6. It is profitable at this stage to refer the decision reported in case of ***Tata Iron & Steel Company Ltd. V. Micro Forge (India) Ltd. in 2000 (2) GLR 1594*** by the Division Bench of this Court, (Per Honourable Mr. Justice J.N. Bhatt) after referring various cases' laws and considering ingredients of Section – 433, articulated certain important chronicles and contours to be kept in the mental radar before reaching the conclusion in winding up the petition as under :

(1)The remedy under Section 433 in general and under clause (e) in particular is not a matter of right, as such, and it is the discretion of the Company Court. It does not confer any right on any persons to seek order that the company should be wound up. It is a provision empowering the Court by a statutory provision to pass order of winding up in an appropriate case.

(2)Merely because any one of the circumstances

enumerated in Section 433 of the Companies Act, exists, the Court is not bound to order winding up of the company. Nobody can aspire to wind up the company as a matter of course. The Court has wide power and discretion. In this connection, inability to pay debts, is required to be judged from various set of facts and circumstances. It may also be stated that inability to pay debts in all cases, *ipso facto*, could not be construed as an appropriate case for winding-up.

(3)The debts is a money which is payable or will be payable in future by reasons of person's obligation. The expression “debt” would refer the liability to pay and it rests on certain contingencies, conditions and casualties. Even, if the debt is proved and even if the inability to pay the debt is also shown, it is not a launching pad, in all cases, for successful winding-up order. Inability may arise for variety of reasons and the Court is obliged to consider whether inability is the outcome of any deliberate of designed action or mere temporary shock and effect of economy and market. In a given case, it may happen that a party may become unable to pay its debts for a while, but that by itself is not a criterion for exercise the power to wind-up, *ipso facto*.

(4)It is necessary for the Company Court to consider the financial status, strength and

sub-stratum of the Company, in overall context. It is possible, at times, there may be a cash crunch. It may be also, possible, at times, the temporary cash crisis despite high sale and heavy turnover, and therefore, in such a situation, mere disability or only on the ground of inability to pay would not constitute a ground empowering the Court to wind-up the Company.

(5)If the Company is an ongoing concern having regular business and employment of employees, the Court can not remain oblivious to this aspect. The effect of winding up would be of putting an end of the business or an industry or an entrepreneurship, and in turn, resulting into loss of employment to the several employees and loss of production and effect on the large interest of the society.

(6)Even dividend declared by the company regularly and heaving profits in the light of the profit and loss account, though temporarily, there may be inability to pay the debt or in case of any eventuality, the company is unable to make the payment of dues and that by itself could not be construed as a ground to winding it up.

(7)Winding-up of a company, as such, is nothing but a commercial death or insolvency, and therefore, the Company Court is obliged to take into consideration not only the temporary inability, or disability to make the payment

of debts, but the entire status and position of the company in the markets.

(8)When grounds on which the winding-up order can be denied, upon an evaluation of the facts of the case, after admission, exists from the record already placed before the Court, it would be a sound exercise of discretion to reject the petition instead of admitting it. This view is very much celebrated.

(9)Inability to pay debts in terms of Section 433 (e) read with Section 434 (1) (a), demand of the debt would raise a presumption as to inability to pay its debts. But such a presumption is rebuttable. Such a presumption may be rebutted on existing material and what evidence is sufficient depends on the facts and circumstances of the case.

(10)If the Company has shown considerable growth in a reasonable span and is a growth-oriented enterprise, even in case of temporary inability would not be sufficient to drive it to wind-up.

(11)Though, ordinarily, an unpaid creditor may aspire for an order of winding-up, then "*ex debito justiciae*" rule is not of inflexible mandate, but is, as such a matter of discretion of the Court.

(12)Section 433 is also indicative of the fact that even if one or more grounds mentioned in Section 433 exist, it is not obligatory for the Court to make an order of winding- up. The

Court has discretionary power. The Court must in each case exercise its discretion in deciding whether in the circumstances of the case, it would be in the interest of justice to wind-up th company. It is a well known rule of prudence that even in case where indebtedness to the petitioning person is undisputed, the Court does not pass order for winding-up where it is satisfied that it would not be in the larger interest of justice to wind-up the company.

(13)It is also well settled that a winding-up order shall not be made on creditor's petition, if it would not benefit him or the company's creditors in general.

(14)The Court is also obliged to consider that it would be in the interest of justice to give the Company some time to come out of the momentary financial crisis or any other temporary difficulty as winding-up is a measure of last resort.

(15)Winding up course cannot be adopted as a recourse to recovery of the debt.

(16)The Court must bear in mind one more celebrated principle and consider whether the Company has reached a stage where it is obviously and plainly and commercially insolvent, that is to say, that its assets are such and its existing liabilities are such as to make the Court feel clearly satisfied that current assets would be insufficient to meet

the current liabilities, along with other principles.

(17)It is also necessary to consider whether the respondent – Company has become defunct or has closed its business for quite some time, whether it is commercially insolvent. For the purpose of finding commercial insolvency, a mere look into the financial data is relevant to examine about its soundness. In all matters relating to winding-up, the Court may have regard to the wishes appropriately. If the Company is solvent, the wishes of the contributories would carry more weight as they are persons, mainly, interested in the assets.

(18)The element of public policy in regard to commercial morality has, likewise, to be taken into account before determining the winding up issue. The Court has also to consider the purpose and policy behind Sections 443 and 557 of the Companies Act.

(19)Winding-up is the last thing the Court would do and not the first thing to do having regard to its impact and consequences. Winding-up of a company would ensue :

(a) Closing down of a company which is engaged in production or manufacture or which provides some services;

(b) it would throw out of employment numerous persons and result in gross hardship to the members of families of

the employees.

(c) loss of revenue to the State by way of collection of taxes which otherwise should have been collected, on account of customs, excise duties, sale tax, income tax etc.

(d) scarcity of goods and diminishing of employment opportunities.

(20)Winding-up petition has to be submitted in prescribed form highlighting all the facts and emphasizing the inability of the Company to pay its debts. The form prescribed under the Company Court Rules, clearly, indicate that the petitioner should provide all necessary material particulars. The petitioner is obliged to show that the financial status or the monetary sub-stratum or the commercial viability of the Company has gone so low and down that winding-up is obviously and evidently unavoidable.

(21)It is a settled proposition of law that winding-up petition is not a legitimate means of seeking to enforce the payment of debt which is disputed by the company,*bona fide*. Winding-up petition ought not to be aimed at pressurizing the company to pay the money. Such an attempt would be nothing but would tantamount to blackmailing or stigmatizing the concerned company by abusing the process of the Court.

(22)Winding-up petition is not an appropriate

mode enforcing *bona fide* disputed debts as it is nothing but misuse and abuse of the process of the Court.

(23)Winding-up petition is not an alternative form for resolving the debt dispute. In certain cases disputes are such that they are fit for resolving through Civil Court rather than through Company Court.

(24)What is bona fide and what is not is a question of fact. The expression “bona fide” would mean genuine, in good faith and when dispute is based on substantial grounds or when defence is probable and with some substance, it is a *bona fide* dispute. It must be strictly noted that winding-up petition is not an alternate to civil suit.

17. Their Lordships have considered whether the dispute raised is genuine and bonafide or dishonest or malafidely after referring to certain English cases in paragraph Nos.25, 26 and 27 and in paragraph No.29, decided cases by the Honourable Supreme Court of India and our High Court and it was held that winding up of a company is a remedy as last resort and competent Civil Court.

18. In view of the above broad parameters applied by the Division Bench, the facts of the present case,

are to be scrutinized.

19. This Court is concerned with the provision of Clause (e) of Section – 433, which provides for exercise of powers by Company Court to pass an order of winding up in case the company is found unable to pay its debts. That as per the above provision of the Companies Act, 1956, if the financial position of the respondent company is perused, it is a leading manufacturer of newsprint and papers in the country and for the year ended 31st March 2006, it had registered a total production of 1,18,092 M.T. and had a turn over of Rs.28806.28 Lacs net of excise duty. The respondent exported goods worth Rs.1394.80 Lacs and final result indicates net profit of Rs.2073.37 Lacs during the said period. This financial result as reflected in the balance sheet indicate that the company is sound, capable and managing its affairs in accordance with the provision of Companies Act, 1956.

20. So far as no material is placed on record, which indicates that the defence raised by the respondent

company is in any manner dishonest or malafide. It is established proposition of law that in case of disputed debt or disputed question of fact, such dispute can be raised before the competent Civil Court by the parties where evidence in nature of documentary as well as oral to be led. In the present case, though the dispute persists about sum of outstanding bills, in view of the clear factual record produced alongwith the affidavit in Sur-rejoinder dated 6th April, 2006 by the deponent and not disputed by the petitioner, exercise of power under Section 433 is not warranted by this Court. Even the claim of the petitioner based on certificate dated 1st November, 1995 annexed at Page 10 of the petition for outstanding dues of Rs.2,55,82,000/- reveals about satisfactorily work performed by the petitioner at the approximate costs. It is not an acknowledgment of outstanding dues of the petitioner company by the respondent. Not only that but reply was given by the respondent company on 19th June, 2001 to the statutory notice dated 31st May, 2001 given by the petitioner company and claim was not admitted at all. It is borne out from the record that the work

undertaken by the petitioner company was completed as early as in year 1995 and letters were addressed by the petitioner company for payment of outstanding dues. Thus, Company Application is filed on 26th June, 2001, admittedly after a period of six years since the work was completed in year 1995. Above fact is reflected in paragraph No.5 of the petition, where interest at the rate of 24% p.a. is claimed from 1996 to 31st May, 2001. Had the dispute been raised before competent Civil Court, it would have been barred by the limitation and therefore, decision relied on by learned Senior Advocate Shri Mihir Joshi in case of ***Gramercy Emerging Market Fund V. Essar Steel Ltd. 2002(0) GLHEL 203852*** and ***Ferro Alloys Corpn. Ltd. V. Rajhans Steel Ltd. 99 Company Cases 426*** are clearly applicable in the facts of the present case. In the first case, learned Single Judge after considering the facts of the case and relevant case laws, has observed that in the case, where claim is to be lodged before the Civil Court and seeking an order of winding up before the Company Court, the question that is to be considered is whether the creditors have presently enforceable claimed or not. If the

creditors were to file the suit for recovery of time barred debts or he were to file a winding up of the petition on the basis of the time barred debts, result would be the same. In the present case, if the above reasoning and findings of learned Judge are applied to the claim of petitioner company, it has become time barred. Similar is a case in Patna High Court, it is held that defence of debt barred by limitation on date of petition is defence on point of law and petition for winding up can not be admitted.

21. Even though, the contention raised by the learned advocate for the petitioner about inability to pay debts by respondent company, examined in the light of parameters laid by the Division Bench in the case reported in case of ***Tata Iron & Steel Co. V. Micro Forge (India) Ltd. 2000 (2) GLR 1594***, there is a bonafide dispute and defence raised by the respondent is both on fact as well as law. On factual aspect, it is clearly established by the respondent company that there is no outstanding dues as per paragraph Nos. 7 and 8 of the Sur-rejoinder. It is clearly explained that how the payment is made to the

petitioner by the respondent Company for the work executed by it. It is made clear that the petitioner has taken gross amount of running Account bills without deducting the payment made in respect of immediately preceding running Account bills. In spite of request made by the respondent, the petitioner had failed to substantiate his claim with statement of Account. Further, it is borne out from the Annexure I to V from page Nos. 47 to 60 of the Sur-rejoinder that all the dues of the petitioner Company are cleared by giving details about date of vouchers, particulars of cheques and Demand Drafts No. of the total amount paid as Rs.2,45,13,163.41.

22. When the learned advocate for the petitioner was called upon to point out any discrepancy to the Annexures, annexed with Sur-rejoinder, learned advocate had fairly submitted that he has no instruction in this regard. It is established by the respondent company that it is a company with adequate financial resources as reflected from paragraph No.11 of Sur-rejoinder, so as to function in accordance with provisions of Companies Act, 1956 and has

discharged its duties towards the petitioner company. Not only that, but by raising a question of law about time barred debts, the claim of the petitioner company lodged in this petition after a gap of six years, can not be accepted and no order can be passed as held in two decisions as above and therefore, prayer by the petitioner to wind up the respondent company, is rejected.

23. Notice is discharged with no order as to costs.

(ANANT S. DAVE, J.)

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